

DECISION



A. Klerman
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

7537

FILE: B-191956

DATE: September 5, 1978

MATTER OF:

The University of New Hampshire,
Center for Industrial and In-
stitutional Development

DIGEST:

1. Protest alleging improprieties in solicitation (no procedures for forwarding proposal from airport to procuring activity) not filed before date for receipt of initial proposals is untimely under Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), and not for consideration on merits.
2. Procuring activity notified offeror that proposals were received late and would not be considered, but offeror could submit evidence of timely delivery for consideration. Protest filed almost 2 months later is timely since it was filed within 10 working days of procuring activity's affirmation of rejection of proposals after consideration of offeror's evidence.
3. Even assuming, without conceding, that Government procedures contributed to lateness of proposals consigned to commercial carrier by offeror for delivery to procuring activity, proposals were properly rejected as late where commercial carrier was significant cause of lateness by making no provision for prompt dispatch of proposals by other available methods from airport to procuring activity as specified in carrier's airbills.
4. Protester has burden of affirmatively proving case. Burden has not been met as to whether agency advised some offerors not to ship their proposals via specified airline where GAO has only conflicting statements of parties.

In December 1977, the Idaho Operations Office of the Department of Energy (DOE) issued solicitation ET-78-D-07-1706. The objective of the solicitation was to receive, and consider for support, proposals for feasibility assessments of adding hydroelectric generation capacity to existing small dams.

The solicitation as amended provided that handcarried proposals were to be submitted on or before 4 p.m., March 8, 1978, to the Department of Energy, Idaho Operations Office, 550 Second Street, Room 107, Idaho Falls, Idaho 83401.

The Center for Industrial and Institutional Development at the University of New Hampshire (University) prepared two proposals. The proposals were entitled "Salmon Falls Hydroelectric Facility Feasibility Study" (Salmon Falls) and the "North River Harveys Mill Site Feasibility Study" (North River).

The University shipped both proposals by Emery Air Freight Corporation (Emery). The Salmon Falls proposal was shipped on March 4, 1978, and arrived at the Idaho Falls airport at 8:50 p.m., March 7, 1978, via Transmountain Airlines. The North River proposal was shipped on March 6, 1978, and arrived at the Idaho Falls airport at 2:49 p.m., March 8, 1978, via Western Airlines. The airlines held the proposals until they were picked up on the morning of March 9, 1978, by EG&G Idaho, Inc. (EG&G), a prime operating DOE contractor. EG&G took the proposals and other air freight to its offices for sorting. The proposals were delivered on March 10, 1978, to DOE.

DOE notified the University that its proposals would not be considered because they were not delivered on or before the deadline of 4 p.m., March 8, 1978, to the office designated in the solicitation. In a telegram, DOE stated in part that if the University had evidence that its proposals were delivered to DOE before the deadline, it should forward the evidence immediately so that the proposals could be considered.

The University submitted information to DOE and contended that both proposals should be considered to have met the submittal deadline. DOE advised the University that, after conducting an investigation into the matter, it affirmed the decision that the University's proposals were received late, and, consequently, they would not be evaluated. Over 50 awards were made under the solicitation in early July 1978.

The University subsequently filed a protest with our Office. The bases of the protest follow:

1. The solicitation was defective because it did not set forth procedures for the shipment of air freight from the Idaho Falls airport to the designated DOE office.

2. Since delivery of air freight from the Idaho Falls airport to the specified DOE office is under the control of DOE, the delivery of the proposals to the air freight offices at the Idaho Falls airport is equivalent to receipt by DOE. The proposals were at the Idaho Falls airport, the designated pick-up point, prior to the deadline of 4 p.m., March 8, 1978. Therefore, they were timely submitted.

3. DOE has a "contract in effect" with the airlines at Idaho Falls and has instructed the airlines that air freight destined for DOE is to be held until picked up by EG&G. DOE involved itself in the process of obtaining and delivering proposals from the Idaho Falls airport, and because of improper DOE actions, the University's proposals were delivered late. The University did not know that it had to plan for or avoid DOE interference with Emery's procedures for delivering the proposals.

4. Shortly before the deadline, DOE made a telephone check with Western Airlines to determine if it had proposals which were shipped via air freight; however, DOE did not make a similar telephone check with Transmountain Airlines. The University was

prejudiced by DOE's limited telephone check. (At the time of the telephone check, Transmountain was still in possession of the Salmon Falls proposal.)

5. Other offerors had an unfair advantage because they were advised by DOE not to ship their proposals via Transmountain Airlines.

DOE asserts that it has no contract with the airlines at Idaho Falls concerning the receipt and distribution of air freight, and EG&G is not an agent for picking up air freight at the airlines' offices. However, it is understood by the airlines that where no provision has been made for forwarding air freight to DOE, the air freight should be held for EG&G pickup. EG&G picks up such air freight each Workday morning and delivers it the next day to the appropriate DOE office.

The agency contends that neither it nor EG&G has any obligation to pick up and distribute air freight, and although EG&G does pick up air freight, it is not required to make any special effort to pick up air freight arriving after the scheduled pickup time. It is also noted that none of the airlines at the Idaho Falls airport delivers air freight; however, offerors other than the University, through their commercial air freight carriers, made arrangements to have their proposals delivered by a local trucking company or by taxi. DOE denies that it advised any offeror not to utilize Transmountain Airlines or any other airlines for the shipment of proposals. However, the agency states that EG&G did advise consignors that future shipments of proposals should not be made via Transmountain Airlines.

DOE alleges further that section 1-3.802-1 of the Federal Procurement Regulations (1964 ed. amend. 178) sets forth the criteria for consideration of late proposals. That provision allows consideration of proposals which are late due to Government mishandling

which applies only where the proposal has been sent by mail. It has no application here because the University's proposals were handcarried.

Finally, DOE argues that the University's protest is untimely under our Bid Protest Procedures, 4 C.F.R. part 20 (1978), since the protest was not filed with our Office until May 16, 1978, or almost 2 months after the University received the DOE telegram advising that its proposals were received late and would not be considered.

The University's first allegation concerns an impropriety in the solicitation. Since this allegation was not filed with either the procuring activity or our Office prior to the date set for receipt of initial proposals, it is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978), and not for consideration on the merits.

We next consider whether the remainder of the University's protest is untimely, as DOE alleges. On March 21, 1978, the University was advised by DOE telegram that the proposals were received late and, consequently, would not be considered. DOE, however, advised the University that if it had evidence that the proposals were delivered to DOE before the deadline, it should submit such evidence immediately. In a preaward letter dated April 26, 1978, the University submitted evidence to DOE. By letter dated May 4, 1978, DOE, after considering the University's evidence, affirmed its position that the University's proposals were received late and would not be evaluated. The University received the letter on May 8, 1978, and filed a protest with our Office on May 16, 1978.

In our opinion, this protest is timely since it was filed within 10 days of receipt of DOE's affirmation of the rejection of the University's proposals following a specific request by the agency for evidence on the matter. See Northwest Marine Technology, Inc., B-191511, July 13, 1978, 78-2 CPD 33.

We have consistently held that an offeror is charged with the responsibility of insuring that its proposal is delivered to the proper place at the proper time. By choosing methods of delivery other than those specified in the late proposal clause, an offeror assumes a high degree of risk that its proposal will be rejected if untimely delivered. Presnell-Kidd Associates, B-191394, April 26, 1978, 78-1 CPD 324. A late handcarried proposal may be considered where lateness was due to improper action of the Government and where consideration of the late proposal would not compromise the integrity of the competitive procurement system. However, a late proposal should not be evaluated if the offeror significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility of delivering a handcarried proposal to the proper place by the proper time, even though lateness is substantially caused by erroneous Government action or advice. See Avantek, Incorporated, 55 Comp. Gen. 735 (1976), 76-1 CPD 75; Presnell-Kidd Associates, *supra*. For a late handcarried proposal to be considered, it must be shown that wrongful Government action was the sole or paramount cause of late receipt. In resolving these matters, we have noted alternate methods of timely delivery available to the offeror or its designated transmitter in sustaining rejections of bids or proposals as late. See Southern Oregon Aggregate, Inc., B-190159, December 16, 1977, 77-2 CPD 477; Sturm Craft Co., B-189811, December 8, 1977, 77-2 CPD 444; Record Electric, Inc., 56 Comp. Gen. 4 (1976), 76-2 CPD 315.

In the instant case, there were various agency procedures to transport proposals sent by air freight from the Idaho Falls airport to DOE, including checking for "last minute arrivals." The record indicates that from time to time, DOE would check with the airlines at the Idaho Falls airport to ascertain if any airline was holding air freight consigned to DOE. Also, the airlines would sometimes inform DOE that it had air freight for a DOE consignee. Once alerted that an airline was holding air freight destined for DOE, DOE would send an employee to the Idaho Falls airport to pick up and deliver the air

freight. The pickups and deliveries by a DOE employee were in addition to those made by EG&G. How these procedures for collecting air freight impacted on the University's proposals follows.

The North River proposal arrived at the Idaho Falls airport at approximately 2:49 p.m., March 8, 1978. Shortly before the 4 p.m. deadline, and after the arrival of the afternoon flight, DOE checked with Western Airlines to determine if it was holding air freight consigned to DOE. In spite of the fact that the North River proposal had arrived, Western Airlines informed DOE that it had no air freight consigned to DOE.

As for the Salmon Falls proposal, on the morning of March 8, 1978, EG&G made its daily routine check with the airlines, but did not pick up any air freight from Transmountain Airlines, even though the record indicates that the Salmon Falls proposal was in the possession of Transmountain Airlines at the time. There is no clear explanation as to why the Salmon Falls proposal was not given to EG&G. The EG&G driver speculates that either no agent was on duty at Transmountain or he was informed by the Transmountain agent that there was no air freight consigned to DOE. Transmountain Airlines did not inform DOE on March 8, 1978, that it had air freight consigned to DOE, and DOE did not check with Transmountain for air freight shortly before the deadline, as it did with Western Airlines.

Against this background, we attach significance to the fact that the University sent both proposals via a commercial carrier, Emery. The Emery airbills indicated that both proposals were to be delivered no later than Tuesday, March 7, 1978, to the DOE address. Despite the clear instruction and deadline on the airbills, Emery shipped the proposals to the Idaho Falls airport, but made no arrangements for forwarding the proposals from the airport to DOE.

Emery asserts that both proposals could have been delivered by delivery vehicle or cab before the deadline but for "longstanding instructions apparently from the [DOE]"; Emery does not specify the contents of those instructions.

Even assuming Emery was entitled to rely on DOE or EG&G to routinely pick up the proposals at the Idaho Falls airport and deliver them to DOE, it was Emery's responsibility to insure that those procedures would result in timely delivery and make appropriate arrangements to have the proposals promptly forwarded from the Idaho Falls airport to DOE by either a local trucking company or by taxi as other offerors or their agents did. This is particularly so since neither proposal arrived by the delivery deadline specified by the University in the Emery airbills at the DOE address for receipt of proposals, and one of the proposals arrived at the airport just over an hour prior to the time for receipt of proposals.

Furthermore, the protester has the burden of affirmatively proving its case. We do not believe that burden has been met as to whether DOE advised some offerors not to ship their proposals via Transmountain Airlines since we have only the conflicting statements of the parties. Reliable Maintenance Service, Inc.,--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

Based on the foregoing, it is our opinion that the failure by Emery, the University's agent, to provide for the prompt dispatch of the proposals from the Idaho Falls airport to the DOE address specified on the airbills was the significant cause of the late delivery of the proposals. Also, the failure of Western Airlines to inform DOE that the North River proposal had arrived on the afternoon flight just prior to the time for receipt of proposals could be viewed as a further cause for its late receipt. Further, Transmountain Airlines may have contributed to the late receipt of the Salmon Falls proposal by not informing DOE of its arrival. Consequently, even assuming, without conceding, some DOE contribution to the lateness of the proposals, we conclude that the proposals were properly rejected as late.

B-191956

9

Accordingly, the protest is denied to the extent that it has been considered on the merits.

P. 7/5/77
Deputy Comptroller General
of the United States